

IN THE COURT OF APPEAL

[1998] QCA 366

SUPREME COURT OF QUEENSLAND

Brisbane

Appeal No. 5684 of 1998.

Appeal No. 5685 of 1998.

[Brisbane Land P/L v. Pine Rivers S.C.]

BETWEEN:

BRISBANE LAND PTY LTD

A.C.N. 053 884 021

(Appellant)

Appellant

AND:

PINE RIVERS SHIRE COUNCIL

(Respondent)

Respondent

Appeal No. 5686 of 1998.

[Brisbane Land P/L v. Qld]

BETWEEN:

BRISBANE LAND PTY LTD

A.C.N. 053 884 021

(Appellant)

Appellant

AND:

STATE OF QUEENSLAND

(Respondent)

Respondent

McMurdo P.
Pincus J.A.
Jones J.

Judgment delivered 13 November 1998

Judgment of the Court

THE ORDERS IN EACH APPEAL ARE -

- (1) SO FAR AS NECESSARY, LEAVE TO APPEAL, IS GIVEN.**
- (2) APPEAL ALLOWED.**
- (3) ORDERS MADE BELOW SET ASIDE.**

- (4) **APPELLANT TO FILE WRITTEN SUBMISSIONS WITHIN 7 DAYS, AND RESPONDENTS (IF SO ADVISED) TO FILE WRITTEN SUBMISSIONS WITHIN A FURTHER 7 DAYS WITH RESPECT TO:**
- (A) **THE ORDERS TO BE MADE TO GIVE EFFECT TO THESE REASONS;**
- (B) **COSTS.**
-

CATCHWORDS: **TOWN PLANNING - subdivisional approval - Council applied to chief executive for written approval of developer's applications - approval refused because subdivision would have a significant impact on the planning of a State-controlled road - on appeal to Planning and Environment Court the State of Queensland opposed the subdivision on grounds to the effect that there were plans for a local arterial road to keep traffic off the Bruce Highway and a possible route would pass through the subdivision land - whether the primary judge's approach that unless it can be shown that the route options are so unlikely that they can be entirely discounted the impact is "significant" is in accordance with the legislation - whether the primary judge failed to exercise the discretion contained in s. 40 - whether the appeals should be remitted to the Planning and Environment Court for further hearing - whether there was no evidence on which it could reasonably be found that approval of the subdivision would have a significant impact on planning of a State-controlled road.**

Transport Infrastructure Act 1994 s. 40

Counsel: Mr P Lyons Q.C., with him Mr T Trotter, for the appellant.
Mr K Dorney Q.C., with him Mr W Cochrane, for the respondent State of Queensland.
Mr A Skoien for the respondent Pine Rivers Shire Council.

Solicitors: Mullins & Mullins for the appellant.
Mr B T Dunphy, Crown Solicitor for the respondent State of Queensland.
Pine Rivers Shire Solicitor for the respondent Pine Rivers Shire Council.

Hearing Date: 23 October 1998.

IN THE COURT OF APPEAL

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Before McMurdo P
 Pincus J.A.
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REASONS FOR JUDGMENT - THE COURT

Judgment delivered 13 November 1998

- 1 These three appeals all relate to applications by the appellant developer to subdivide land. The site is one at Murrumba Downs to the west of the Bruce Highway in the vicinity of the Pine River. The developer has applied for subdivisional approval in stages; these appeals concern stages P11 and P12.

2 To decide all three appeals, it is necessary to deal only with Appeal No. 5686 of 1998, to which the respondent is the State of Queensland. This is so because if that appeal is allowed then nothing remains to be decided with respect to the other two appeals, each of which is against a deemed refusal of applications for approval of subdivision; we were informed by Mr Skoien, who appeared for the Council, that there is no issue in respect of the applications for subdivisional approval except the question involved in Appeal No. 5686 of 1998. It is that appeal, then, which requires discussion and we shall call the State of Queensland "the respondent".

3 The decision of the Planning and Environment Court from which the appeal is brought was given on 4 June 1998, by which date there had come into force (on 30 March 1998) s. 6.2.1 of the *Integrated Planning Act* 1997 which repealed the *Local Government (Planning and Environment) Act* 1990. Provisions of the 1990 Act giving this Court jurisdiction to entertain appeals from the Planning and Environment Court were replaced by provisions, to different effect, contained in Chapter 4 Part 1 Division 13 of the 1997 Act. That Division includes s. 4.1.56, reading in part as follows:

- "(1) A party to a proceeding may, under the rules of court, appeal a decision of the court on the ground -
 - (a) of error or mistake in law on the part of the court; or
 - ...
- (2) However, the party may appeal only with the leave of the Court of Appeal or a judge of Appeal".

The expression "court" is defined in Schedule 10 to mean the Planning and Environment Court. The corresponding provision of the *Local Government (Planning and Environment) Act* 1990 was s. 7.4(3), under which an appeal could have been brought against the decision attacked here, without the necessity of obtaining leave. There was some brief discussion

before us on the question whether it is the old or the new appeal provision which should be applied. In our view the Court need not reach a conclusion on that point, since the case is one in which leave should if necessary be given; this is so because it brings before the Court, for the first time, questions as to the effect of an important provision, s. 40 of the *Transport Infrastructure Act* 1994. This requires a local government to obtain the chief executive's written approval if -

- "(a) it intends to -
 - (i) approve a subdivision, rezoning or development of land; or
 - ...
- (b) the approval ... would -
 - ...
 - (iii) have a significant impact on the planning of a State-controlled road or a future State-controlled road".

4 The evidence in the present case showed that, apparently regarding the provision just quoted as potentially applicable, the Council applied to the chief executive for approval of the applications made by the developer relating to stages P11 and P12; that was refused by a letter dated 22 October 1997 which explained that s. 40(1)(b)(iii), which we have quoted, was the provision relied on. That is, approval was refused on the basis that the approval would have a significant impact on the planning of a State-controlled road or a future State-controlled road.

5 The *Transport Planning and Coordination Act* 1994, read with s. 196 of the *Transport Infrastructure Act* 1994, makes sections of the former Act, providing for review, applicable to the decision of the chief executive to which we have referred. Those provisions had the effect, in summary, of enabling the developer to apply for a review of the decision conveyed by the letter of 22 October 1997 to which we have referred, and entitling

the developer to treat the decision of which a review was sought as having been confirmed if a decision was not made on the application for review within a specified time: see ss. 29, 30, 31 and 34 of the *Transport Planning and Coordination Act 1994*. Here, an application for review was made by the developer by a letter dated 21 January 1998 and, no decision having been made on that application within the specified time, the original decision was taken to have been confirmed. There was then a right of appeal against the confirmed decision, under s. 196(4) of the *Transport Infrastructure Act 1994*, and that right was exercised.

6 While the developer's appeal against the decision of the chief executive was awaiting a hearing, the Planning and Environment Court made an order for directions, on 4 March 1998. That order dealt with a number of matters and included the following:

"... that on or before 11 March, 1998 the Respondent notify the Appellant of the grounds on which it intends to oppose this appeal.

. . . that the disputed issues in this appeal be identified as the grounds of opposition notified pursuant to this Order".

Grounds of opposition were filed on 11 March 1998. It is unnecessary to set them out in full; they do not contain any specific reference to the point on which the appeal was ultimately decided. In summary, the grounds were to the effect that there were plans for a local arterial road, referred to in the grounds as the North-South Urban Arterial Road ("the North-South Road") whose function it was to keep traffic off the Bruce Highway, and the Department of Main Roads was in the process of determining a route for the North-South Road.

7 Evidence was taken before the Planning and Environment Court in April 1998 and

subsequently, as arranged with that Court, written submissions were filed. It is necessary to refer only to those filed on behalf of the State of Queensland. They referred to the issues identified in the grounds of opposition and, in substance, argued for acceptance of the following propositions:

1. Traffic on the Bruce Highway could be expected to increase considerably.
2. If the subdivisions were approved that would eliminate at least two of the route alignment options relating to the proposed North-South Road.
3. It was expected that in June 1998 or shortly after that the developer could be told whether or not a preliminary route location study had identified the subject site as being the possible location of the North-South Road.
4. The whole of the estate would not be finally developed for years and the location of the proposed North-South Road was important to the 'ongoing development' of the developer's land.
5. Lots P11 and P12 might be able to be developed at a later stage, after other lots within the estate.
6. The chief executive's decision should not be set aside unless it was unreasonable in the Wednesbury sense, i.e. unless it was 'conduct which no sensible authority acting with due appreciation of its responsibilities could have decided to adopt'.

8 There was also reference to the question of noise, but that, it appears, is not thought to be presently relevant. The principal point, as it seems to us, which was made by the submissions filed below on behalf of the respondent was that it had not been decided where the North-South Road was to be located and at least two of the "route alignment options" would be eliminated if the subdivision proceeded.

9 The learned primary judge sitting in the Planning and Environment Court upheld the chief executive's decision and dismissed the appeal. Since the argument advanced by Mr P Lyons Q.C., who led Mr T Trotter for the appellant, depended upon the language used in the reasons of the Planning and Environment Court, it is necessary to quote at some

length:

"Upon the state of the evidence before me it is just as likely that the north-south arterial road, if and when it is constructed, will not encroach upon the subject land and of course it is not known at this point whereabouts on the land it may be constructed if that should occur, and at what elevation in relate (sic) to other land surfaces it would be built. The evidence in that respect being uncertain and relating to a mere possibility, is not of sufficient weight to prevent approval of the subdivision applications. [692]

...

"The proposed north-south arterial road is not a future State-controlled road within the terms of the section, and indeed the statement of the grounds of opposition by the respondent makes it clear that what is in issue in this appeal is the impact of the proposed subdivisions on the planning of the Bruce Highway which is a State-controlled road. [694]

It is proposed to upgrade the Bruce Highway in the area in which the subject land is situated to an eight lane highway. This will proceed whether or not the subdivision applications are approved, and it is not suggested that the proposed subdivisions will impact upon the planning of the Bruce Highway, or with the execution of that planning, so far as traffic generated by reason of the subdivision is concerned, or with reference to land requirements of the Department for the proposed widening of the highway . . . The situation giving rise to the respondent's grounds of opposition to the appeal is that the route of the north-south arterial road, which is intended to provide a link between the Gateway Arterial to the south and Anzac Avenue to the north, has not yet been determined, and possible routes for the road would carry it across the area of the appellant's land which is the subject of the subdivision applications. A brief for a route location and impact assessment study of the proposed north-south urban arterial road in the Mango Hill/Griffin area was prepared by the Department of Main Roads in December 1997. [695]

...

Of the seven options identified in the brief, three involve the construction of the north-south arterial road across the appellant's land. That in itself is not a matter of significance in this appeal, since it is not the planning of the arterial road which is in issue. [696]

...

If the subdivision applications are approved, therefore, that approval will have an impact on the planning of a State-controlled road, namely, the

positioning of any linkages or interchanges between the north-south arterial road and the Bruce Highway, consequent upon the particular route selected for the north-south arterial road. The next question is whether or not the impact will be significant. In my opinion, unless it can be shown that options which entail construction of the arterial road across the appellant's land and which also entail linkages or interchanges with the Bruce Highway are so unlikely that they can be entirely discounted, then the impact of removing them as options in the planning process, at this point in that process, is a "significant" impact. As I understand it matters at this stage are not advanced to the point where those options could be reasonably so described, so that the impact of approving the applications upon the relevant planning of the respondent could be regarded as not significant. It follows, in my opinion, that the Chief Executive of the Main Roads Department was entitled to withdraw his approval of the subdivision applications under s. 40 of the *Transport Infrastructure Act* 1994 as he in fact did". [697]

10 It will be noted that although the grounds of opposition (which his Honour quoted) were based principally on uncertainty as to the location of the North-South Road, it was necessary for the judge to consider only the effect approval of the proposed subdivisions would have on the planning of the Bruce Highway; that was so because the North-South Road is not intended to be a State-controlled road. Approval of the subdivisions could have no direct effect upon the planning of the Bruce Highway. The judge was apparently of the view that there was an indirect impact, related to the positioning of any linkages or interchanges between the Bruce Highway and the proposed North-South Road. Mr Lyons

complained, for the developer, that the grounds of objection did not draw attention to this point and, he argued, it was not one which was litigated and so there was a denial of natural justice. There is substance in that argument, but we shall first deal with two other points made by Mr Lyons.

The Test of Significance

11 The judge's approach was that unless it "can be shown that [relevant] options . . . are so unlikely that they can be entirely discounted" then the impact must be regarded as "significant". It was pointed out during the course of the hearing that this places an onus upon the appellant to make a prediction as to the likely future actions of those responsible for road planning and that is a matter on which one would expect at least an evidential onus to fall on the respondent, the point at issue being one on which the planners' knowledge would obviously be superior to that of the appellant. Further, the onus is a heavy one; it is not enough, as we understand the reasons, to show that any relevant option is unlikely to be adopted; proof must go so far as to justify the conclusion that it can be "entirely discounted". What this appears to mean is that if there is any chance that one of the options being considered, involving road construction across the appellant's land, will be accepted by those planning the roads, then the appeal must fail. All the chief executive has to do, in order to succeed in such an appeal as this, is - if the judgment is right - to point to planning options, not yet known to have been discarded, which may cut across the subject land.

12 It is our respectful opinion that this does not accord with the intention of the legislature, so far as one can discern it from the language used. Section 40 of the *Transport Infrastructure Act* 1994 does not say that a local government must obtain the chief

executive's approval if the subdivision would, if approved, have a possible impact upon the planning of a State-controlled road; the impact must be a significant one. Whether this test is satisfied will depend on factors which must vary from case to case, but they might include whether an option, pursuit of which would be difficult or impossible if the development proceeded, appears to be one which cannot be closed off without incurring some real disadvantage; or more generally, whether the constraint on the planning process which would ensue from permitting the development seems likely significantly to impede the task of arriving at a satisfactory road plan. It is not necessary, in order to construe s. 40, to use any test other than that imported by the word "significant", whose meaning is plain enough; the mere existence of one option which is inconsistent with the proposed development, and which may possibly be adopted by the planners, cannot show that the development would have a significant impact on planning. Questions of degree are involved and the proper conclusion will sometimes be that, although some impact on planning can be seen, that impact does not appear to be significant.

- 13 In summary, it is our opinion that the learned primary judge erred insofar as his Honour decided the case on the basis that the impact of approval must be characterised as "significant" if the road planning on which it is said to impact includes any option conflicting with the proposed development and adoption of which is not so unlikely that it can be entirely discounted. This was an important step in the judge's reasoning and vitiates his Honour's conclusion.

Discretion

- 14 Mr Lyons also contended that the learned primary judge erred in that his Honour,

having decided that there was a significant impact, failed to exercise the discretion which s. 40 intends to impose on the chief executive, to give or withhold approval. The argument was that the judge assumed, incorrectly, that once the "significant impact" test was satisfied, that was the end of the case. It was contended on the respondent's side, by reference to various passages in the reasons that the judge, although he did not expressly say so, in truth exercised a discretion. It will have been noticed that the last passage from the reasons which we have quoted concludes by saying that the chief executive was "entitled" to withhold his approval. The succeeding paragraph of the reasons says in substance that the Council was justified in not approving the applications for subdivisional approval, as the chief executive had not given his approval under s. 40. There is nothing in that paragraph which suggests that his Honour thought any further question arose, as between the developer and the chief executive, once the conclusion had been reached that the chief executive was "entitled" to withhold his approval, that flowing from the view that approval of the subdivision would have a significant impact.

15 In short, the argument advanced for the respondent that some exercise of judicial discretion occurred is devoid of substance. The only question is whether the judge's apparent failure to appreciate that a question of discretion arose involved an error. In saying that a local government must obtain the chief executive's written approval in certain circumstances, s. 40 implies the existence of a power in the chief executive to give or withhold it. Further, there is nothing in s. 40 to suggest that the chief executive must withhold approval, or should do so, whenever the approval of the local government would have a significant impact on planning of a relevant road; that can be deduced from the fact that unless there is a significant impact, there is no obligation under s. 40(1) even to apply

for approval.

16 In our respectful opinion the judge's reasons do not disclose an appreciation of the existence of the discretion to which we have referred; it was one which his Honour was obliged to exercise by s. 36B(1) of the *Transport Planning and Coordination Act* 1994, which had the effect of vesting in the Planning and Environment Court, in deciding this appeal, the same powers as the chief executive had.

17 This was in our opinion a legal error and it, too, vitiates the judgment.

Remission

18 Mr Lyons contended that the appeal relating to the chief executive's approval should be allowed as well as the other two appeals and that this Court should itself approve the subdivisions; the alternative course is to remit all the appeals for further hearing. He said there was no evidence to support the view that linkages between the North-South Road and the Bruce Highway would have a significant impact on the planning of the Bruce Highway and he referred us to the record in support of that contention.

19 Consideration of this point is complicated somewhat by a degree of ambiguity in the learned primary judge's reasons, quoted above. In the passage which we have quoted from p. 697, the first sentence dealt with the impact of "positioning of any linkages or interchanges", conveying the idea that those linkages or interchanges are the problem. But the third sentence in that passage includes the expression:

"... unless it can be shown that options which entail construction of the

arterial road across the appellant's land and which also entail linkages or interchanges with the Bruce Highway ...".

That implies that his Honour regarded linkages or interchanges with the Bruce Highway as relevant only if related to options which involved construction of the North-South Road across the relevant land. This concept seems at odds with that expressed in the first sentence; but in our view it is the first sentence which should be regarded as truly expressing the primary judge's opinion.

20 The respondent did not attempt to justify the chief executive's decision on the basis that the North-South Road would be State-controlled. It follows that whether or not the North-South Road would cross the land the subject of the subdivision applications was not in itself material. With respect to linkages or interchanges between the Bruce Highway and the North-South Road, the respondent's contention no doubt would be that a planning option which had a linkage or interchange between the two roads cutting across the subject land would be relevant because the location of such a linkage or interchange would be a matter impacting on the planning of the Bruce Highway.

21 For the reasons we have explained above, to decide whether any option under which a linkage or interchange cut across the subject land would constitute adequate reason for refusing approval under s. 40 of the *Transport Infrastructure Act* 1994 would necessitate considering not only whether there was a significant impact on the planning of the Bruce Highway, but also, ultimately, the exercise of a discretion. The only passage in the evidence dealing directly with the question of the linkages or interchanges is one in the evidence of Mr G R Holdsworth, a witness for the respondent (pp. 73 and 74). This,

however, appears to have been a new thought; the report (Exhibit 10) which Mr Holdsworth prepared did not rely upon it. In the report (p. 8) Mr Holdsworth raised a number of objections the essence of which appears to be in the following sentence:

"Preliminary investigations have indicated that the subject land would be required if the Lawnton Pocket Road is connected to the Bruce Highway and the future North-South arterial".

Neither in that summary nor in the body of the report is there any suggestion that the location of linkages or interchanges between the North-South Road and the Bruce Highway constituted a planning problem. Much of the evidence before the primary judge, in particular that of Mr N D Viney, dealt with the objection that if the North-South Road were not built the Bruce Highway would become excessively congested. The witness called from the Department of Main Roads, Mr P G Just, said nothing to support the suggestion that the location of the linkages or interchanges was a problem; he told the Court that a consultant had been engaged, that a study was underway and that there were 6 options (not 7) for the creation of the "corridor", apparently meaning the North-South Road. Mr Just seemed to concede that all 6 options, and indeed the whole idea of the corridor, might be ruled out, but did not claim to have any current involvement in the process of consideration of these issues, which appears to have been in the consultant's hands.

22 It is our opinion that the evidence which was called with respect to the possible location of linkages or interchanges between the Bruce Highway and the proposed North-South Road could not, if the matter were approached on the basis of a proper construction of s. 40 of the *Transport Infrastructure Act* 1994, justify the chief executive's decision. Leaving aside the circumstance that neither the ground of opposition filed, nor the written submissions made on behalf of the respondent in the Planning and Environment

Court, expressed or implied that the linkages or interchanges to which we have referred were the basis of the decision attacked, the evidence relating to those linkages or interchanges could not satisfy the "significant impact" test. The evidence showed that there were in 1997 seven options proposed for the placement of a North-South Road, four of which would involve an interchange between that road and the Bruce Highway. Of those four, two only affected the land proposed to be subdivided. Whether inability to take advantage of one of those options would make a real difference or indeed any difference, in a practical sense, was a subject on which there was no evidence. This was hardly surprising since the location of the interchanges was not in any way placed in issue; mentions of it in the evidence (other than in the passages of Mr Holdsworth to which we have referred) were merely incidental.

23 If the chief executive wished to rely upon the location of any possible linkage or interchange between the proposed North-South Road and the Bruce Highway as a basis of the refusal of approval, that should have been clearly set out as a ground of opposition, pursuant to the order of the Planning and Environment Court requiring that the "disputed issues in this appeal be identified as the grounds of opposition". Further, one would have expected the respondent to adduce evidence before the Court to enable it to determine not merely whether the proposed subdivisions would have a possible impact on planning, but whether any impact would be significant. This was a matter largely (if not entirely) within the knowledge of those making the plans. The options to which the judge referred are part of a "brief" dated December 1997. Mr Just's evidence was to the effect that he thought it would be known by mid-1998 (when judgment was given below) whether or not any option "would be the subject of a detailed impact assessment study". It appears that work had been

done on the relevant proposal for some months after the brief on which the judge relied was prepared; but Mr Just said nothing to suggest that he was aware of the current state of progress, as at the date of his evidence, 16 April 1998. One would have expected the respondent to call evidence on that topic; its not having done so may justify an adverse inference - O'Donnell v. Reichard [1975] V.R. 916 at 929. In these circumstances, Mr Lyons' submission that there was no evidence on which it could reasonably be found that approval of the subdivision would have a significant impact on planning relating to linkages or interchanges between the proposed road and the Bruce Highway must be accepted. It does not appear to us that it would be fair to remit the case for further evidence to be adduced. What has happened, in essence, is that the respondent has succeeded before the Planning and Environment Court only on an issue of which no proper notice was given and as to which the evidence called could not support a conclusion adverse to the appellant. The three appeals should be allowed and subdivisional approvals granted.

24 It follows in our view that the proper orders in each case are -

- (1) So far as necessary, leave to appeal, is given.
- (2) Appeal allowed.
- (3) Orders made below set aside.
- (4) Appellant to file written submissions within 7 days, and respondents (if so advised) to file written submissions within a further 7 days with respect to:
 - (a) the orders to be made to give effect to these reasons;
 - (b) costs.